(2)

FILED
DEC 30 1997

No. 97-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LESLIE ABROMSON, et al.,

Petitioners,

vs.

AMERICAN PACIFIC CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STEVE MORRIS
KRISTINA PICKERING
SCHRECK & MORRIS
1200 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 474-9400

FRANK ROTHMAN
Counsel of Record
WARREN L. ETTINGER
MICHAEL RIPS
DAVID S. SHUKAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000

Attorneys for Respondents

14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THERE IS NO CONFLICT IN THE HOLDINGS IN THIS CASE AND IN *POMMER*. BOTH DECISIONS REACH CONSISTENT RESULTS BASED UPON THE APPLICATION OF THE SAME LAW TO DIFFERENT FACTS	5
II. THERE IS NO COMPELLING REASON, NOR IS THERE AN IMPORTANT QUESTION OF FEDERAL LAW, THAT WOULD JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI	6
III. THE NINTH CIRCUIT PROPERLY GRANTED SUMMARY JUDGMENT	7
IV. THE NINTH CIRCUIT PROPERLY DISREGARDED THE MARKET REACTION TO THE DISCLOSURE OF THE THIOKOL LAWSUIT	9
V. THE NINTH CIRCUIT PROPERLY APPLIED THE BALANCING TEST SET FORTH IN *BASIC* TO REJECT PETITIONERS' APPEAL	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
Abromson v. American Pacific Corp., 114 F.3d 898 (9th Cir.), *petition for cert. filed*, No. 97-916, 66 U.S.L.W. 3418 (U.S. Dec. 2, 1997)	8, 10
Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)	9
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	7
Basic Inc. v. Levinson, 485 U.S. 224 (1988)	9-10
Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	4
Pommer v. Medtest Corp., 961 F.2d 620 (7th Cir. 1992)	3, 5-6, 9
Statutes:	
Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737	10
Other Authorities:	
Sup. Ct. R. 10	4, 6

No. 97-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LESLIE ABROMSON, et al.,

Petitioners,

vs.

AMERICAN PACIFIC CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In May of 1988 an explosion and fire destroyed the southern Nevada production facilities of the predecessor of WECCO, a subsidiary of AmPac[1]. At the time, the company was one of only two manufacturers of ammonium perchlorate ("AP"), an oxidizing agent used in the aerospace and national

[1] AmPac is the acronym for American Pacific Corporation. WECCO is the acronym for Western Electrical Corporation. AmPac is used herein to refer to both entities.

defense industries. AmPac's principal customer for AP was Thiokol, the prime contractor for NASA, which used AP for the Space Shuttle.

Their desire to have two sources of AP prompted NASA and the Department of Defense ("DoD") to persuade AmPac to construct a new facility to produce AP. At the behest of NASA, WECCO entered into a series of agreements (hereinafter, the "W-T Agreements") which obligated WECCO to construct the facility from private financing provided by Security Pacific Bank.[2]

The W-T Agreements stipulated that the borrowed money and all interest charges would be repaid from funds generated by a surcharge on all sales of AP by WECCO. Thiokol was obligated to purchase an amount sufficient to enable WECCO to make the loan payments. The Federal Government agreed to reimburse Thiokol through NASA's purchases from them.

The W-T Agreements called for the bank loan to be repaid during the course of purchases by Thiokol of not less than 140 million pounds of AP over a period of seven years, at a rate of not less than 20 million pounds a year.

Under the terms of the loan agreement with Security Pacific Bank only WECCO was permitted to prepay the $92 million loan.

Prior to and during the class period, AmPac made numerous public statements to the effect that Thiokol was "obligated" to assure WECCO's sale of AP for the seven year period, that these sales were "assured," and that the W-T Agreements would "insulate" AmPac from competition in the AP market. These statements were included in AmPac's annual 10-K reports for 1991 and 1992, as well as the prospectus for the April 15, 1992 stock offering.

---

[2] Security Pacific Bank was subsequently replaced by Seattle First National Bank; however herein the loan will be referred to as the "Security Pacific Bank Loan."

During 1991 and 1992, NASA spoke to AmPac about paying off the loan from Security Pacific in fewer than seven years. AmPac also discussed the subject with Thiokol. In its 1991 10-K AmPac indicated the possibility of an early payoff.

During the discussions the parties disagreed as to whether a prepayment of the loan would terminate Thiokol's obligation to purchase AP from AmPac. AmPac's position was that only WECCO could prepay the loan and that WECCO would only do so if it were placed in a financial position that was the same or better than its position under the W-T Agreements. Because these preconditions were not met, WECCO refused to agree to prepay the Loan and the W-T Agreements remained in effect, with the parties continuing to perform in accordance with their obligations.

On June 11, 1993 Thiokol filed suit in Utah state court against AmPac seeking a judicial declaration that the complete repayment of the Security Pacific Bank Loan would terminate Thiokol's obligation to make further purchases of AP from AmPac. In its complaint Thiokol falsely alleged that AmPac had already agreed to early repayment of the loan. Such an agreement simply did not exist, and there was no evidence whatever that it did. Both the trial court and the Ninth Circuit so found.

Thiokol subsequently dismissed its lawsuit. Upon public disclosure of Thiokol's lawsuit, the price of AmPac's stock dropped precipitously.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Ninth Circuit's decision in this case does not place it in direct conflict with the Seventh Circuit's holding in *Pommer v Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992); the Ninth Circuit's decision in this case is not a departure from standard judicial practice so as to call for intervention by the United States Supreme Court; and this case does not involve an important question of federal law that should be decided by the Supreme Court. Finally, the decisions of the Courts below

were correct. In all respects, the District Court's ruling was a straightforward application of the summary judgment standard to a record that did not contain any material evidentiary conflict.

A petition for writ of certiorari to the Supreme Court may only be granted by the Court upon a showing of "compelling reasons." Sup. Ct. R. 10. Other than in exceptional circumstances, the Supreme Court has limited the granting of the writ, in cases arising in the federal system, to the following categories: **I.** decisions of federal courts of appeal that conflict with other federal courts of appeal on the same important matter, or that are such a departure from standard judicial practice as to call for the Court's intervention; **II.** decisions of federal courts on an "important question of federal law" that (1) has not been, but should be, decided by the Supreme Court or, (2) has been decided in a way that conflicts with the decisions of the Supreme Court. *See* Sup. Ct. R. 10.

Rule 10 of the Rules of the Supreme Court clearly states that petitions based on an asserted error of facts or on claimed misapplication of a rule of law will "rarely [be] granted." From this the Court has adopted a correlative rule -- the "two courts doctrine" -- which holds that the Supreme Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

The Petition in this case is plainly deficient in that it fails to satisfy any one of the categories set forth above, and, more particularly, violates the "two courts doctrine." The entire Petition, as will be discussed, is little more than an attempt to persuade this Court to review asserted mistakes of fact that were concurred in by both the District Court and Court of Appeals.

I. THERE IS NO CONFLICT IN THE HOLDINGS IN THIS CASE AND IN *POMMER*. BOTH DECISIONS REACH CONSISTENT RESULTS BASED UPON THE APPLICATION OF THE SAME LAW TO DIFFERENT FACTS

Eager for a writ, Petitioners simply manufacture a conflict between the Ninth Circuit's decision below and the Seventh Circuit's decision in *Pommer v. Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992). The decisions do not conflict.

The Ninth Circuit and Seventh Circuit -- confronted with factual and evidentiary records that were wholly dissimilar -- came to different conclusions regarding the materiality of the alleged misrepresentations. The two Circuits are not in disagreement over the relevant legal standard or its application. Put simply, different facts produced different results, hardly an unusual development and certainly not one that remotely justifies a writ of certiorari.

The plaintiff in *Pommer* had purchased an ownership interest in the defendant company based on the representations that the company had obtained a valuable patent on a certain process and that the sale of the company at a favorable price was imminent. *Pommer*, 961 F.2d at 622. Neither representation was true at the time it was made.

The case went to the jury, which found in favor of the plaintiffs. The trial judge overturned the verdict, holding, among other things, that the misrepresentation regarding the patent was immaterial. The Seventh Circuit found that the jury was justified in ruling for the plaintiff and would have been justified in finding that the misrepresentation was material.

The Seventh Circuit, not surprisingly, held that a statement that is both material and false at the time it is made does not become immaterial owing to later developments (*i.e.*, the issuance of a patent). *Id.* at 623. *Pommer* has no application to this case. First, the uncontroverted evidence established that

AmPac never made a misleading statement regarding the W-T Agreements, and subsequent events only confirmed the truthfulness of AmPac's representations.

Second, the Seventh Circuit in *Pommer* balanced the possible economic impact of having a patent denied (a patent that would have been the corporate defendant's sole asset) against a 20% chance of that denial occurring. On the other hand, the Ninth Circuit balanced the possible economic impact of prepayment of the Loan against a "virtually zero" possibility of that occurring. In *Pommer* there was a substantial probability of economic injury; in this case the uncontroverted evidence established that there was no probability of economic injury that was attributable to anything done by AmPac.

What Petitioners really object to is the Ninth Circuit's application of the law to the facts with which Petitioners must live. Under the law correctly applied by the Ninth Circuit and under this Court's Rules, the Supreme Court should deny certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or *the misapplication of a properly stated rule of law.*") (emphasis added).

Absent a conflict between the Ninth and Seventh Circuits on the same or similar facts, and given the entirely consistent application of the same rule of law to those facts, Petitioner's argument for granting the requested writ falls far short of sufficient grounds for its issuance.

II. THERE IS NO COMPELLING REASON, NOR IS THERE AN IMPORTANT QUESTION OF FEDERAL LAW, THAT WOULD JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI

In seeking a writ of certiorari, it is incumbent upon the Petitioners to demonstrate the necessity of action on the part of the Court. This standard might be satisfied if Petitioners had demonstrated that an important question of federal law has been decided by the courts below in a way that conflicts with

prior Supreme Court decisions, or that there is such an important question raised by this case that it should be decided by the Court. Petitioners here have entirely failed to make any such showing. An examination of the three questions presented in the Petition demonstrates that Petitioners have only the narrowest of issues, and that none of these issues provide a basis for the granting of a writ of certiorari.

III. THE NINTH CIRCUIT PROPERLY GRANTED SUMMARY JUDGMENT

Petitioners argue that the Ninth Circuit, in the context of reviewing the correctness of the District Court's granting AmPac summary judgment, usurped the role of the jury by weighing the evidence in the case and then making a finding on the ultimate issue of fact -- namely, the materiality of AmPac's decision not to disclose its discussions with Thiokol and the government. (Pet. at 11.) This, Petitioners argue, violates the Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Petitioners' argument misstates the record and what was done by the District Court and affirmed by the Court of Appeals. Each court reviewed the entirety of the record to determine whether there was a "genuine issue of material fact" to present to a jury. Each concluded there was no issue of fact as to the materiality of AmPac's failure to disclose its discussions with Thiokol about a wholly hypothetical prepayment that was not agreed to and was entirely under AmPac's control.

The District Court and Ninth Circuit concluded that the "evidence" proffered by Petitioners was nonexistent and that Petitioners had mischaracterized the underlying facts of the case in an effort to create an impression that there was credible evidence on the issue of the materiality of AmPac's failure to disclose the Thiokol discussions. Neither the District Court nor the Ninth Circuit "balanced" evidence on the ultimate issue of fact in the case, because there was no evidence to balance.

Petitioners proffer two pieces of evidence that they allege establish an issue of fact on the materiality of AmPac's failure to disclose the nature of its discussions with Thiokol and the government: (1) a letter from Thiokol's outside counsel simply accepting, without discussion or factual support, Thiokol's false assertion that AmPac had agreed to prepayment of the loan; and (2) the drop in the market price of AmPac's stock when information regarding the "dispute" between WECCO and Thiokol was disclosed. (Pet. at 11.) Neither piece of evidence is probative.

Both Courts below found that AmPac never agreed to repayment of the loan and that there was absolutely no evidence to the contrary. Thiokol's outside counsel expressed no basis for his opinion that AmPac had agreed to prepayment. In a footnote he recited that he "understand(s) that WECCO and the bank have agreed to full satisfaction of the loan obligations in 1993 . . . ." (ER 899.) There is no indication in the record as to the basis or source of this "understanding." A genuine issue of material fact does not and cannot arise in the absence of admissible evidence. Thiokol's counsel was not part of the discussions between AmPac and Thiokol. At best Thiokol's counsel may have been relying on information from an undisclosed third party who was never identified. The unsubstantiated recital of this "understanding" clearly was inadmissible hearsay and had no probative value.

As to the fall in the market price of AmPac's stock, the courts below found that the price had indeed fallen, but not in response to the disclosure of discussions between AmPac, Thiokol and the government. The Courts below properly found that the price fell in response to the public disclosure of Thiokol's false and baseless complaint. *Abromson v. American Pac. Corp.*, 114 F 3d 898, 901, 903 (9th Cir.), *petition for cert. filed*, No. 97-916, 66 U.S.L.W. 3418 (U.S. Dec. 2, 1997). For this reason, the drop in the price of AmPac's stock was of no evidentiary significance to the courts below.

What Petitioners object to in the opinions below is the considered conclusion of two courts that the "facts" argued by

Petitioners were entirely without support in the record. Petitioners now seek to have this Court overturn that determination made by both Courts below. This Court has adopted a rule that precludes a writ of certiorari based on alleged error of facts when both lower courts are in agreement as to those facts. For this reason the writ must be denied.

IV. THE NINTH CIRCUIT PROPERLY DISREGARDED THE MARKET REACTION TO THE DISCLOSURE OF THE THIOKOL LAW SUIT

Petitioners contend that the Ninth Circuit contravened this Court's holdings in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) by ignoring the market reaction to the disclosure of the Thiokol law suit against AmPac. According to Petitioners, *Basic Inc.* and *Affiliated Ute Citizens* require that a court take into consideration the market reaction to the disclosure of the truth about an alleged misrepresentation or omission in determining its materiality.

Petitioners mischaracterize the holding of the Ninth Circuit. The Ninth Circuit did not hold that, as a matter of law, market reactions are never relevant to the issue of materiality. Rather, the Ninth Circuit held that the facts of this particular case did not support the contention that the market price declined in response to the disclosure of the truth regarding the discussions between Thiokol, AmPac and the government.[3]

The Ninth Circuit rejected the relevance of the drop in the price of AmPac stock based on a finding that the stock price fell as a result of false information contained in the Thiokol complaint (*i.e.*, the assertion that AmPac had agreed to prepayment of the loan) and not as a result of the disclosure of

---

[3] "The truth (or falsity) of defendants' statement, and their materiality, must be assessed at the time the statements are made, and not in the light of hindsight." *Pommer v. Medtest Corp.*, 961 F.2d 620, 625 (7th Cir. 1992).

the truth concerning prior discussions between Thiokol, AmPac and the government regarding the W-T Agreements.

V. THE NINTH CIRCUIT PROPERLY APPLIED THE BALANCING TEST SET FORTH IN *BASIC* TO REJECT PETITIONERS' APPEAL

Petitioners contend that the District Court, with the blessing of the Court of Appeals, deprived them of their right to have the jury determine "materiality" as set forth in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). (Pet. at 16.) To make such a determination, the magnitude of possible loss is weighed against the probability that the loss will occur. *Id.* at 238. The Ninth Circuit, however, affirmed summary judgment only after concluding that there was *no probability* that AmPac would suffer economic injury from a prepayment of the Loan. *Abromson*, 114 F.3d at 902-03. The reason for this result is straightforward and unassailable: there was no evidence anywhere in the record that AmPac would have even considered prepayment of the Loan unless it was placed in an economic position that was equal to or better than its position prior to prepayment. *Id.* at 903. With the probability of economic loss from prepayment at "virtually zero," there was nothing to weigh on one side of the *Basic Inc.* scale. Consequently, summary judgment was warranted and plainly correct. *Abromson*, 114 F.3d at 903.

Petitioners are seeking from this Court the extraordinary decision that the issue of materiality is *never* appropriate for summary judgment, a ruling that would mean, *a fortiorari*, that all securities fraud cases, however frivolous, would go the jury. No court has so held, and such a suggestion is contrary to recent developments in the securities law, including the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. Petitioners' assertions would require this Court to overlook these two dispositive facts: (1) AmPac *never* consented to prepayment; and (2) AmPac repeatedly asserted it would consider prepayment *only* on the condition that it would not sustain any loss.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK ROTHMAN
Counsel of Record
WARREN L. ETTINGER
MICHAEL RIPS
DAVID S. SHUKAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

STEVE MORRIS
KRISTINA PICKERING
SCHRECK & MORRIS
1200 Bank of Ameica Plaza
300 South Fourth Street
Las Vegas, Nevada 59101
(702) 474-9400